SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 393

CALMAN COOPER,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITIONER'S BRIEF

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ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF FOR PETITIONER CALMAN COOPER

The Opinion Below

The Court of Appeals of the State of New York affirmed without opinion the judgment of conviction and the sentence of death[1] imposed upon petitioner (303 N.Y. 856).

Jurisdiction

The judgment of the Court of Appeals of the State of New York was entered on March 6, 1952. On June 3, 1952, by order of Mr. Justice Reed, the time within which to file

[1] Mr. Justice Jackson granted a stay of execution on April 7, 1952, pending a determination of an application for a writ of certiorari.

a petition for a writ of certiorari was extended to June 6, 1952, on which date the petition and accompanying brief were filed.

The jurisdiction of this Court was invoked under 28 U.S.C.A. 1257 (3), Rule 38 of the Rules of the Supreme Court of the United States, and the remittitur of the New York Court of Appeals, amended by order of that Court, dated April 18, 1952, to add the following:

"Questions under the Federal Constitution were presented and necessarily passed upon by this Court, viz: whether the admission in evidence of the confession of the defendant Cooper violated his rights under the Fourteenth Amendment to the Constitution of the United States, * * *. This Court held that the rights of the defendants under the Fourteenth Amendment to the United States Constitution had not been violated or denied." (303 N.Y. 982).

At the trial, the People were permitted to put into evidence a confession[2] of petitioner Cooper, over his objection and exception, that such admission was in violation of the due process clause of the Fourteenth Amendment of the Federal Constitution, an objection seasonably asserted at every stage of the trial,[3] as well as on appeal to the Court of Appeals, in the Brief and on the oral argument.

On October 13, 1952, this Court granted leave to proceed *in forma pauperis* and granted Certiorari "limited to the question as to the admissibility of the confessions" (73 S. Ct. 53, No. 3).

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[2] People's Exhibit 59, Rec. 2875-2886; 1280.

Note: The exhibits appear in volume V, only one copy of which was available to petitioner for filing herein.

[3] Rec. 160, 1174, 1275-1280, 1305, 1444, 1451, 1520, 1521, 1522, 1542, 2273-2275. These numbers, as well as numbers in parentheses hereinafter used in this Brief, unless otherwise indicated, refer to page number of printed trial record.

The Crime Charged

The indictment charged the crime of Murder in the first degree, based upon felony murder,[4] committed by Calman Cooper, Harry A. Stein, Nathan Wissner, as well as by Benny Dorfman, whose trial, on motion of the District Attorney, was severed, and who testified for the prosecution (8-11).

Question Presented

Did the admission in evidence of petitioner's confession constitute a violation of his rights under the due process clause of the Fourteenth Amendment to the Constitution of the United States?

Specification of Errors

The right of the petitioner to be accorded due process of law under the provisions of the Fourteenth Amendment to the Constitution of the United States has been invaded and violated:

A. When a confession is admitted in evidence against the petitioner on trial for his life, conceded by the testimony of State Police to have been obtained from him some thirty-six hours after he had been arrested on the street near his home in the City of New York, and thence carried off to isolated barracks of the State Police in a County outside the city of New York, where he was incarcerated incommunicado, without opportunity to consult with friends or counsel, kept handcuffed, fully clothed at all times, and subjected to incessant questioning by relays of State Troopers for at least twenty hours between the evening of June 5th and the late evening of June 6th, before confessing, and where arraignment was delayed for about eighty-five hours,—a delay held by the trial court to have been in violation of the laws of the State of New York.

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[4] Section 1044 of State Penal Law.

B. When, in addition to the above proven facts, there is put in issue the petitioner's claim that he was physically beaten to extort his confession, and there is indisputable evidence of marks upon the petitioner's body, which could have been caused only by the infliction of physical violence, a jury is permitted to speculate that such physical injuries may have been self-inflicted, in the absence of any competent proof whatever that they were or could have been self-inflicted, and thus ignore such marks of physical injury as indicating that the confession was forcibly extorted in violation of the petitioner's right to due process of law.

Statement of the Case

The facts of the case on the issue before this Court, as testified to in the main by the State Police, prosecutor, jail officers, jail physician, and other State and County officers, are as follows:

On April 3, 1950, four robbers held up a truck owned by the Readers' Digest Association on its private driveway, at Chappaqua, New York (211). William Waterbury, accompanied by Andrew Petrini as messenger, was driving the truck to deposit company funds in a local bank (214). A single shot fired by one of the robbers (215) passed through the window glass of the door of the truck and caused Petrini's death a few hours later (167; 171-2). The robbers escaped with three bags containing checks and currency, the property of the Readers' Digest Association.

The Arrests

On Monday, June 5, 1950, at about 9:10 A.M., on the public street of New York City outside of his home (1310-1311), seven or eight State Troopers in civilian clothes (1337-8), accompanied by a New York City detective (1965), arrested Calman Cooper *as a participant in the murder* (1181, 1364, 1400, 1423, 2071).

At this same time and place they also arrested and handcuffed petitioner's sixty-five year old father (790, 1311, 1365, 2998).

Arthur Jeppeson, a subsequent prosecution witness, who was present at these arrests, was also taken into custody at that time (790).

The police took the prisoners to the East 67th Street Police Station (798, 1965), where they were not booked by any of the arresting officers (1335, 1341), although the law, the police admitted, required that they do so (1963). Petitioner and his father were not placed in available cells, but were hidden away, handcuffed, in a police bedroom (1337), where they were confined until 1:00 P. M. (1311). They were then spirited away by State Troopers to their Barracks at Hawthorne, New York, located forty miles from the place of arrest, in another County, where they arrived at about 2:00 P. M. (1311, 1312).

Calman Cooper's brother Morris, at approximately 4:00 P. M. of that same day, was arrested at a New York City air terminal (2039-2040), while waiting for a plane to Florida, in which state he resided (2045).

The State Troopers never notified the District Attorney of Westchester County of these arrests, either when petitioner and his father were at the East 67th Street Police Station or upon their arrival at the Barracks (1225, 1341).

The co-petitioner Stein was arrested on Tuesday, June 6, at 2:00 A. M., in his brother's home in New York City (1958, 1960), by State Troopers dressed in civilian clothes and by several New York City detectives (1850). They failed to book Stein, as they failed to book the Coopers, in any New York City Police station (1963), but, after driving away with him from his home in one unmarked car, transferred him to another unmarked and privately owned car (1699), and carried him away to the Hawthorne Barracks (1689).

The co-petitioner Wissner, together with his wife who was present at their breakfast in a restaurant adjoining his place of business, on Wednesday, June 7, 1950, at about 9:00 A. M., was seized by plainclothed State Troopers and New York City detectives. The arresting officers placed them also into privately-owned cars and, without booking them in any New York City Police station, hustled them away to the same Barracks (1325, 2300, 2311, 2312, 2316).

The State Troopers admitted that they knew that the arrests were of importance, that the District Attorney was interested in solving this murder case, and that, prior to these arrests and immediately after the commission of the crime, he had interviewed witnesses in this case, yet they did not call upon the District Attorney to come to question Calman Cooper (1341, 1367, 2001, 2008), who had been arrested as a participant in the murder (1181-1364-1400-1423). The police testified that they were going to do the "questioning" themselves (2001). The State Police Commander of the Barracks, Captain Glasheen, testified that there are thirty-five men in the Bureau of Criminal Investigation attached to his Barracks, that they were all on duty on Monday, June 5, that it is their duty to "question" the prisoners, and they do not have to be ordered to "question" a prisoner but that "they do it of their own will" (2004-2005).

The State Police Barracks of Troop K

The New York State Police Barracks of Troop K, at Hawthorne, N. Y., are located in a secluded rural section of Westchester County. The buildings are completely isolated, with no surrounding buildings, and with no possibility of any outcry being heard, or of occurrences therein being witnessed by any outsider (1339). The nearest building, a schoolhouse, is distant "1,000 feet or more" from the Barracks, and was not inhabited during many of the hours

during which petitioner was being "questioned" (1339, 1340, 1554, 1599).

There are no detention cells at the Barracks (1369), and no sleeping quarters for prisoners or suspects (1369, 1929). A prisoner therein must rely upon the generosity of the State police for his food (1208, 1907, 2010). Captain Glasheen testified that he determines when someone in custody at his barracks eats, sleeps, or uses toilet facilities; that he had the arbitrary power to enforce his wishes in those respects, and that there is no supervisory power to check whether or not a prisoner therein is being well treated (2010-2013).

The Bureau of Identification Room at Barracks Wherein Petitioner Was Confined

This Bureau of Identification Room (hereinafter referred to as B. of I. room) was fifteen by twenty feet in size (1394, 1202), in which four persons usually worked, in the midst of at least two desks, five chairs and fourteen filing cabinets (1344, 1635, 1636). Other Troopers go there to examine official records (1403). This room is not in the main building, but is two hundred feet away from it across a courtyard (1910, 1598). When petitioner Cooper was confined therein, lights burned in this room throughout the night (1431). One window looks out into a courtyard, the other window looks into the direction of a parkway, with houses visible one-half mile away (1599, Exh. B.B., 1602, 2964).

Petitioner Cooper never saw his co-petitioners during all the detention period at the Barracks because he was held in the B. of I. room, while Stein was being held in a basement locker room of the main building (1905), and Wissner was hidden away in still another basement billiard room (2020). Petitioners, after their arrest, saw each other only when they were produced in Court for arraignment, hand-

cuffed to State Police, and surrounded by many other law-enforcement officers (Exh. 62, 1325, 2894).

The Detention at the Barracks

Petitioner was photographed and fingerprinted at the Barracks between 2:00 and 3:00 P. M., on Monday, June 5, (1177, 3006). About a half hour later he was delivered to the B. of I. room (1181-1182), where he was seated, handcuffed, in a chair (1183, 1390 1638) and guarded by at least three armed, uniformed Troopers (1390, 1392).

Petitioner's father and his brother Morris were also photographed and fingerprinted (3002, 3004) by the troopers, who consider this procedure a regular routine (1185, 1191); each was given separate criminal identification numbers.

The fingerprints, photograph and pedigree (Exh. G.G.G., 2998-2999, 1408; Exh. K.K.K., 3002, 1550) of the father were taken, although the arresting officer, Sergeant Sayers, admitted that he did not charge the petitioner's father with a crime (1364) nor did he charge him with anything else (1365). Although the printed form of the father's arrest card (Exh. G.G.G., 2999a, 1408) provides for a "Brief history of Crime Committed", the card alleges *no crime* against the father who, fingerprinted and photographed, was kept incarcerated in handcuffs (1371) for *two and a half days* (1374-1375), without anyone ever questioning him during that time (1366, 1368, 1369, 1374). He was held, the police admitted, without any legal sanction except their own arrogation of authority (1371). During the trial, the District Attorney, in chambers, brazenly argued—in the face of all the preceding facts—"that there is no proof of incarceration of Cooper's father", but that "there is proof that he was up in the Barracks" and "it is open to the public (1304)". No report or record was made available to show

why he was arrested or why he was released after arrest and detention, even though the regulations of the State Police required it (1409-1410).

Beverly Wissner, wife of one of the co-petitioners, seized at the time of her husband's arrest solely because she was with him, was held, like the others, incommunicado and under guard at the Barracks (1665-1666). She was compelled to sleep, fully clothed, on a mattress on the floor in the same room where petitioner Cooper was kept (1656-1657). A day and a half after her illegal incarceration (1661), ostensibly of her own free will, but actually under duress, she executed, in order to regain her freedom, a general release absolving Sgt. Sayers and other officials (Exh. S, 2960, 2255). That instrument, allegedly, but fraudulently, attesting that she signed "without compulsion of the authorities, and upon my own free will", was witnessed by Lawrence N. O'Neill, a stenographer of the District Attorney's office. The facts implicit in the execution of that instrument—she was imprisoned for thirty-six hours without any legal sanction—gives the true measure of voluntariness in the concept of the State Police. Such State Police "interference" with an individual's "person or liberty"—to quote from the instrument—had, in fact, the approval of their highest superiors, and was admittedly so "usual" that they found it necessary to have mimeographed forms of general releases handy in the Barracks (2251, 2256, 2257).

The Questioning

Sergeant Barber of the State Police admitted that he began "questioning" petitioner Cooper in the presence of armed guards (1393, 1394, 1403, 1404), at 8:00 P. M., on Monday night, June 5, eleven hours after his arrest (2072). He "questioned" Cooper for five hours (2074, 2077, 2081). Sergeant Sayers (1344, 1352, 1353) and Trooper Buon

(2099, 2100) were with him during those five hours and *they, too, participated in the "questioning"* (2073). Cooper persisted in his denials of complicity (2099, 2117, 2121). The troopers admitted that their questioning of Cooper resulted in failure (2075, 2102). When Sergeant Barber retired at 4:00 A. M. Tuesday—nineteen hours after petitioner's arrest—Cooper had not confessed (2080).

Sergeant Sayers and Trooper Buon resumed their "questioning" on Tuesday morning and "questioned" Cooper until noon time (1357, 1361, 2075, 2102). Sergeant Barber questioned petitioner most of the time from Tuesday morning until around dinner time (1403-1404-2074). Trooper Buon, too, questioned him "on and off" all afternoon on Tuesday until about 6:00 P. M. (2119-2121) in the presence of armed guards.

District Attorney Fanelli, an alert prosecutor who was on the scene of the crime in less than one hour after its commission (1105), and who was interviewing witnesses about one hour after the crime (151, 205, 279, 450, 451, 2689) testified that he learned of Cooper's arrest only on Tuesday afternoon—that is, about thirty-six hours after Cooper's arrest—when he was questioning, not Cooper, the then suspected participant in the murder, but Jeppeson, who had been taken into custody with Cooper the day before (788, 789, 1225).

We know from the record, of course, that, at the time this belated knowledge came to the prosecutor; that Cooper had not confessed. We therefore submit to this Honorable Court that the state police deliberately withheld such knowledge from the prosecutor to have ample time to extort a confession. Other more damning reasons for his failure to go to the Barracks at once will readily occur to this Court without the necessity of putting them in words.

Accepting Mr. Fanelli's sworn testimony, the police with-

held from him knowledge that they had arrested Cooper, an alleged participant in the murder, yet, when he admittedly learned of Cooper's arrest thirty-six hours after its occurrence, he did not even telephone to the Barracks to inquire about the petitioner Cooper (1225-1226).

What is of equal importance, if not more so, is the prosecutor's complacency in not complaining to the State Troopers about their failure to carry out the clear command of the State law to arraign the petitioner Cooper before a magistrate "without unnecessary delay" (1227).[5] Although Dorfman—much later—was arraigned on the night of the very day of his arrest, the District Attorney did nothing to cause the arraignment of Cooper on Tuesday, after he then knew of Monday's arrest, nor on Wednesday, nor on Thursday morning or afternoon, despite the fact that the new Castel Court was available for arraignments *at any time or any hour around the clock* (1270). The District Attorney stated that he was under the impression—contrary to the command of the State statute—that the law tolerates "a certain reasonable delay" (155-1226).

Captain Glasheen, commander of Troop K, was of the opinion that he could wait until *the rest* of the suspects were taken into custody (2008). The troopers testified that, prior to the taking of the confessions, *none of the questioners of Cooper had made a single written notation at any time of what their "questioning" revealed for their five hours work on Monday night and for their work on Tuesday, from morning until 6:00 P. M.* (1352, 1357, 1361, 1362, 2072, 2074, 2101). Nor did the State Troopers use as stenographer Mrs. Klaus, a civilian stenographer attached

[5] Section 165 of the Code of Criminal Procedure. Rule 5 of the Federal rules of Criminal Procedure, like the state statute, provides for arraignment "without unnecessary delay". Section 1844 of the state Penal Law makes it a crime to violate Section 165 of the Code of Criminal Procedure.

to Troop K (1571), who usually works in the very room where Cooper was held (1634), who testified that she was ready and able to take a statement on Monday afternoon (1639). Nor did the State Police use Corporal McLaughlin, himself a stenographer, who was present during petitioner's detention and questioning in the B. of I. room (1442, 1443, 2103). McLaughlin in fact *worked* in the very room (1195) where he later took down Cooper's confession on his typewriter (1171).

Troopers testified that the petitioner Cooper on Tuesday night was brought into the presence of his father, each separately handcuffed (1372).

Sayers, not a mere trooper, but a sergeant and senior officer in charge (1338), sworn to uphold the State and Federal Constitutions, upholder of our Bill of Rights and our American liberties, testified that he agreed, doubtless magnanimously, to release Cooper's sixty-five year old father,—at the moment admittedly incarcerated illegally, against whom no charge had been lodged—if petitioner confessed. Petitioner Cooper, a former six-year inmate of Dannemora State Hospital confined therein for "psychosis, with psychopathic personality", (Exh. S.S.S. T.T.T. U.U.U., 2487; 2064; 2487-2508), and who, as we shall later show, had been brutally beaten by his "questioners", is alleged to have accepted the proffer by confessing to the crime (1372). Balzac himself describes no scene more poignant and more shocking to one's moral conscience than this alleged bargain, to free a father acknowledged to be innocent, only in exchange for an admission of guilt from his suspected son.

The father's release, however, occurred, not on Tuesday night, after the confession, but almost twenty-four hours later, on Wednesday, June 7 at about 9:00 P. M. (1375-1380).

John Reardon, attached to the New York State Division of Parole (1441), testified that he was at the Barracks on Monday, June 5, at 7:00 P. M. (1441). He did not see petitioner that night, although he remained there until 9:00 P. M. (1441), and although he then knew that the petitioner was there on a murder charge (1462). He returned on Tuesday, June 6, at about 7:00 P. M., and, at about 8:00 P. M., saw the petitioner, whom he had never seen prior to that evening (1441, 1442, 1448). He never saw, and never spoke to petitioner alone, but always in the presence of one or more State troopers (1464). Reardon further testified that he called for his superior—State Parole Commissioner Edward Donovan—who, in response to such call, appeared at the B. of I. room on Tuesday, June 6, at 10:00 P. M. (1450); that, as a result of conversations between Commissioner Donovan and petitioner Cooper, wherein the commissioner made certain promises to petitioner (1452-1453), the petitioner thereafter gave an oral confession (1453-1454) and, at some time after 11:00 P. M., the petitioner began his typewritten confession (1459-1460, Exh. 59, 2874-2886) which ended and was signed by petitioner at about 2:30 A. M. of June 7 (1317-1318, 2068). Commissioner Donovan added his name to the confession as a witness, but was not called upon to testify by the prosecution.

There can be no doubt but that the purpose for which petitioner was held incommunicado for three and a half days at the State Police Barracks was solely one to afford the State Police an uninterrupted illegal opportunity to extort from the petitioner, by whatever means they were disposed to use, the confessions that were later used against him.

The Arraignment

The arraignment took place on Thursday, June 8, at about 10:00 P. M., *more than eighty-five hours after petitioner's arrest* (1268, 2150).

Sgt. Sayers, evidently trying to cover up the People's failure to arraign the petitioner duringt he usual daytime Court hours, and to account for a late secret night arraignment on Thursday for one arrested on Monday morning, testified that the arraigning magistrate was available "only at night" (1328). That was false, for the clerk of the arraigning Court testified that the Court was available for arraignments *at any time or any hour around the clock* (1270).

The three petitioners appeared before the Court, handcuffed (1330) and surrounded by law-enforcement officers. Besides the judge, petitioners, and photographers, there were, in this fifteen by twenty or thirty feet courtroom (1327), at least fifteen law-enforcement officers crowded around the petitioners (1326-1327, 1205, 1269, 2130). None of the petitioners was represented by Counsel (2017). None had a single friend or relative present. Not a single member of the Bar, excepting the judge and prosecutors, was present that night (2177-2178). The District Attorney's stenographer testified that the petitioners "looked none too clean" (2152). The Courtroom picture (Exh. 62, 2894, 1325) shows the petitioner Cooper shielding his face with his coat to prevent his picture being taken. The minutes of arraignment show that, during questions directed at Cooper, the Court ordered Cooper to put down his coat "so I can see you" (3016).

The District Attorney admitted on June 13, 1950, in proceedings before the then County Judge Gallagher, that on the Thursday-night arraignment of June 8, petitioner Cooper "complained to the Court about photographers be-

ing present''—(2978). The minutes of that June 8 arraignment (Exh. R.R.R. 3016-3018, 2017) fail to show that complaint, even though the prosecutor, who was present at the arraignment, was giving his recollection of what had occurred only five days before (2974). The challenge to the integrity of the minutes of the arraignment is based, therefore, upon the statement of the prosecutor himself. We cannot say, from the silence of the minutes, because of their inaccuracy and incompleteness, whether Cooper did or did not complain of police brutality. But, under the facts of this case, it is of no significance here whether Cooper did or did not complain of a beating before the committing Magistrate. He had then been within the absolute power of the State Troopers for *three and a half days*. There was no proof as to whether his mind or the mind of Stein or Wissner was functioning; whether they had had sufficient sleep or food; or whether they had received any drug. The State Troopers admittedly continued to have custody of Cooper and his two co-petitioners *after* the arraignment (2017) until they delivered them to the jail about midnight (2018).

Despite Captain Glasheen's and District Attorney Fanelli's attempted justification for the delayed arraignment of the three petitioners, the Court held as a matter of law that the delay was unnecessary (2777).

The Jail

Allen, the County Jail Warden, testified that Sergeant Sayers brought the petitioners into the County Jail at 11:45 P.M. on Thursday, June 8, 1950 (1273, 1858).

To rebut later, when we discuss the baseless explanation of the Respondent to account for the injuries which the petitioners had when the State Troopers released Cooper, Stein, and Wissner from their clutches, we detail their cell locations in the jail from the time that Sgt. Sayers left

them at the County Jail until they were examined by the jail physician.

The three petitioners were separately locked in widely separated cells in different cell blocks (1868, 1869, 1872, 1875, Exh. Q.Q.Q., 3014, 1872). Stein's cell was on one extreme end of "B" Cell Block, Cooper was on the other extreme end of "A" Cell Block (1866-1867). No other prisoner occupied any cell on the gallery on which Cooper was held; and no other prisoner occupied any cell on the gallery on which Stein was held. They were completely isolated from one another and from any other prisoner (1869). The two cell blocks shown in the diagram (Exh. Q.Q.Q., 3014) were three and one half feet apart and fifty feet in length, with solid walls between them (1870). One prisoner could not see another in his cell (1871). Wissner also was in a cell by himself with empty cells on his gallery. His cell is not shown in the diagram in evidence as it was in a distinctly different part of the jail (1882). All three petitioners were kept in solitary confinement (1875). Allen further testified that no reports were made to him that petitioners had incurred any injuries in the jail (1875-1876).

Dr. Vosburgh's Examination of Petitioners at the Jail

The jail doctor, a County appointee (1236), as shown by prison records contemporaneously made by him, arrived at the jail on Friday, June 9, at 9:45 A.M., and left at 11:30 A.M. (Exh. O.O.O., 3008, 1753, 1758). He therefore spent a total of one and three-quarter hours in the jail that morning. He testified that the time of his arrival was not indicative of the time when he commenced to examine Wissner, his first patient. There is a wait of three, four, perhaps five minutes after one prisoner leaves the clinic and another enters (1861). He examined ten pris-

oners that morning (Exh. O.O.O., supra), including the three petitioners who were brought separately from their cells to the clinic, and examined separately from each other or any other prisoner (1860, 1861). Each of the examination reports which he filled out at the time of examining the three petitioners contained *thirty-two* separately listed classified items which required his examination and notation (Cooper; Exh. B.B.B., 2971, 1240; Wissner, Exh. P.P.P., 3011, 1781, Stein, Exh. 65, 2909, 1734).

It is therefore apparent that the doctor could not devote much time to each prisoner.

The doctor, at his first examination of the three petitioners, found bruises and evidence of physical injury on all three (1759). He testified that it was not a part of his duty to communicate with the District Attorney to tell him that he had found the reported bruises on the petitioners. He felt that it was not his duty to inquire *how* they got those bruises and injuries (1759), although he admitted that, in order to treat a person, he must first ask, "How did you come by these injuries or bruises?" (1764). He admitted further, "I don't even ask them" (1766), and that he never asked the petitioners for an explanation of the injuries (1254, 1759). He testified that, when prisoners complain to him of injuries received as a result of police brutality, he "usually" makes a note to that effect on their medical examination report (1243, 1244, 1728), but admitted that there were no such other "usual" notes when he was challenged by the defense to produce them (1729), despite his earlier testimony that all the records he makes are kept at the jail (1711).

We now note only those injuries which Dr. Vosburgh found on each of the three petitioners:

On Wissner, the non-confessing defendant, arrested at 9:00 A.M. on Wednesday, June 7, and the first prisoner he

examined on Friday morning (1754), Dr. Vosburgh noted and officially recorded: "bruises (on) left posterior lateral chest" with "abrasions (on) both shins", evidently open wounds (1771). Dr. Vosburgh also noted a fracture of a rib (Exh. P.P.P., 3011, 1781), later confirmed by the County hospital X-ray report of Wissner, taken three days later, which read as follows: "There is a fracture of the left sixth rib, slightly anterior to the mid-axillary line. The fragments are without appreciable displacement" (2957). On the day that Wissner was X-rayed, Dr. Vosburgh also noted "small ecchymotic areas of both thighs, small ecchymotic area of the left side of abdomen and buttocks (and, a) small lump on head" (3002).

On Stein, second to be examined alone, Dr. Vosburgh reported officially "bruises (on) left bicep area" (2909), "in the left upper arm, between the elbow and shoulder" (1748).

John J. Duff, Stein's attorney, examined him a few hours later, and made a less hurried and more detailed observation of Stein's injuries (1838). He observed that there were "bruises on the left arm, his right arm and left lower ribs below the breast" (1839). Duff observed and made note of the dimensions of the bruises, as follows: "The left arm, area of discoloration and bruises, approximately 7 inches long and 4 inches wide. Right arm, above the elbow, discoloration and bruises about 3 inches long and 1 inch wide. Left lower chest, second, third and fourth ribs, from the floating ribs to the left and below left breast, black and blue marks in area approximately 3 x 4 inches (1840).

The prosecution did not in any way question Duff regarding the true existence and extent of the injuries as he testified, but did in fact concede that Duff would not commit perjury (1845).

On petitioner Cooper, last of the three petitioners examined (3008), Dr. Vosburgh noted "bruises (on the) left posterior lateral chest, abdomen, (in the) right bicep area (and on) both buttocks" (Exh. B.B.B.—2971, 1237-39, 1240), and black and blue marks, and injuries under the left arm-pit (1238-1244).

Mr. Thomas J. Todarelli, a practising member of the Bar for twenty-six years, together with his law partner Peter L. F. Sabbatino, visited Cooper for the first time at the County Jail on Saturday, June 10th. They found there Daniel J. Riesner, another attorney who was then visiting Cooper (1259). Cooper stripped in the presence of the three attorneys. Mr. Todarelli noted the injuries of Cooper on Saturday, June 10, at 2:00 P.M. (1260). A complete description of Cooper's extensive injuries, as noted by Mr. Todarelli, is found on pages 1260 to 1262 of the certified record. Mr. Todarelli's description supplements Dr. Vosburgh's report of the day before (Exh. B.B.B., 2971, 1240). The prosecutor at the trial did not in any way question Mr. Todarelli concerning the accuracy of his testimony concerning Cooper's injuries, as he noted them at his visit to Cooper, nor was Mr. Todarelli's testimony successfully refuted in any other manner. Nor did the prosecutor at that time indicate his dissatisfaction with the sufficiency, accuracy or reliability of Mr. Todarelli's testimony as to these bruises which conceivably could then have required the additional cumulative testimony of Sabbatino, Cooper's trial counsel, or of Riesner.

Dr. Vosburgh further testified that the injuries of Cooper could not be a week old, could possibly be six days old (1246), and could have been inflicted on June 5—that is, they could have been four days old when he first saw them on Cooper (1247-1248). He admitted that blows with a human fist, rubber hose or a club were a competent producing cause of those injuries (1240).

Petitioners' Complaints Concerning Injuries Received at Barracks

Deputy Warden Allen of the County Jail admitted that Cooper's Counsel on Saturday, June 10, at the time of their first visit to Cooper, complained to him, Allen, about State Police brutality against Cooper (1882).

District Attorney Fanelli admitted that Cooper's attorney telephoned to him on Saturday, June 10 (1228-1229). He admitted, following that telephone call, receiving and reading the telegram the attorneys sent to him that same Saturday (1231). He recalled that on that day the attorneys asked him for permission to have a further physical examination of the petitioner Cooper (1284). The District Attorney conceded that Cooper's attorneys complained to him on June 10 concerning Dr. Vosburgh's report of June 9. He further admitted that at that time the attorneys complained about the inadequacy of the prison doctor's examination (1294), and that the telegram contained, in part, the following language: "* * * official records do not show true extent of injuries he (Cooper) received" (Exh. C.C.C. for iden., telegram, 2973, 1232, 1290, 1291, 1307). In spite of these protestations, Cooper's attorneys did not succeed in inducing the District Attorney to consent to an examination by another physician on that Saturday, June 10, or at any other time.

It was the positive duty of the prosecutor, as a quasi-judicial officer, to ascertain the full facts so as to brand Cooper's counsel's accusations as false or to accept them as true. It was easily within his power to have another physician check on defense counsel's accusations. His failure to do so is more than persuasive proof that the charges were well founded.

Swartz, the photographer at the jail in which petitioner was held, testified that he was capable of, and had both

the facilities and equipment for, taking a full length picture of the petitioner, stripped, had he been ordered to do so (2187).

On Tuesday, June 13, Cooper's attorney appeared before the then County Judge, Hon. Elbert T. Gallagher, who subsequently presided at the trial of this case, complained to him about the mistreatment of Cooper and requested that a physical examination of Cooper be permitted (2982-2983). A transcript of Mr. Todarelli's application before Judge Gallagher, showing the resistance of the District Attorney to have Cooper examined, is contained in Exh. D.D.D. for identification (2974-2981, 1258). On June 15th, on Cooper's County Court arraignment, Judge Gallagher again refused to permit a physical examination of Cooper by another doctor (2982-2983).[6]

The then attorney for co-petitioner Wissner also made application on June 15 before Judge Gallagher for permission to have another doctor examine Wissner. The District Attorney opposed this application "vigorously" and it was denied (1873-1874).

District Attorney Fanelli further admitted that the attorneys for Cooper and Wissner sued out writs of habeas corpus returnable before Mr. Justice Flannery, seeking the same relief for a fuller medical examination, but in vain, because of the vigorous opposition of the prosecutor, (1308, 1309, 1873, 1874, Exs. F.F.F. 1283, 2984-88). Simi-

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[6] Mr. Todarelli, on the arraignment, addressed Judge Gallagher, in part, as follows (2982):

"* * * there cannot be any danger whatever of showing to your Honor here in open court the marks of violence that were inflicted upon the defendant and which he now bears, even though a week has elapsed since the last of the beatings took place. * * * I now offer to show your Honor the marks that appear upon this man's body here in open court. If your Honor does not do that I stand prepared to produce a Westchester physician; it can be done in open court or in chambers."

lar complaint was also made on Stein's behalf by Counsel assigned to him on July 24.

District Attorney Fanelli testified that he questioned some of the troopers about petitioners' complaints and accusations (1233); however, he did not recall when he did so. He did not make a stenographic record, nor any other kind of official record, of his interviews with these troopers (1233). He did not make any memorandum whatever (1233). Not a single trooper who took the stand, however, supported the District Attorney, for none testified that he was ever questioned by him about any beating of Cooper. Trooper Buon, one of the trio of "questioners", testified that he was never questioned by Mr. Fanelli, by any superior, or by anyone else as to whether he had ever beaten Cooper (2125). Strange as it may seem, Trooper Buon swore that he had heard about Cooper's black and blue marks *for the first time* only when he testified on the witness stand at the trial (2124).

Captain Glasheen, commander of Troop K of the State Police at Hawthorne, testified that he had never heard that we had sent to District Attorney Fanelli a telegram (2047), nor was he ever questioned by the District Attorney about its contents (2048). As a matter of fact, the first time he had heard of our telegram was while he was on the witness stand, under questioning of Cooper's defense counsel (2048). Captain Glasheen admitted that he was never questioned by the District Attorney, or by anyone else, about the charges of brutality against his troopers made by Cooper's Attorney *in that very courtroom* (2048). Mr. Todarelli's charges before Judge Gallagher were not even called to the attention of any one (2049), and yet this is the same Captain Glasheen who pretended that he was kept informed as to what was going on in this case (1999).

The stenographer, Anna Klaus, was never questioned by

anyone about her knowledge of any beatings of Cooper (1650).

Corporal McLaughlin, who typed Cooper's confession, was never questioned by the District Attorney about the beatings of Cooper up to the very moment that he was on the witness stand. *He knew of no one in Troop K. that had ever been questioned by Mr. Fanelli* (1217). Dr. Vosburgh's report was never called to Corporal McLaughlin's attention (1217). No one in official authority had ever questioned him about the beatings received by Cooper (1218).

John F. Reardon, a witness to the written confession, testified that he was never told by the District Attorney, nor by anyone else, before he took the witness stand, that the defense claimed that Cooper's confession was brought about by beatings (1466, 1467). He admitted that he had heard at the Barracks that there were newspaper reports about the alleged beatings (1468), but he could not name any specific trooper with whom he had had any such discussion (1448). He never asked to go to see Cooper to seek verification of the truth or falsity of the report. (1469).

Assistant District Attorney O'Brien made the statement, in open Court before the jury, "that the press never did carry a story that the defendant was beaten" (1470). To meet the challenge of the Assistant District Attorney, we offered in evidence a headline contained in the Reporter-Dispatch, published on Tuesday, June 13, 1950, in the City of White Plains, where the trial of this cause took place (Exh. III for ident. 1471, 3000). Although the Assistant District Attorney was immediately shown the headline (1471), he refused to retract his statement, the Court refused to direct him to do so (1473), and the newspaper clipping, which disproved the Assistant District Attorney's statement, was denied admission in evidence, over defense exception (1472).

Mr. Reardon, even up to the time that he took the stand, had never telephoned to Mr. Fanelli to check on the charges that Cooper had been beaten (1474). He never sought to speak to Cooper privately before he acted as witness to the confession, to ascertain if Cooper's statement was voluntary (1479), although he had heard of the "Third Degree" (1478). He did not ask that Cooper be stripped to be sure that he had not been beaten (1480). He made no inquiry as to whether Cooper had been fed, or whether he had received water to drink (1484). He made no inquiry as to whether Cooper had slept (1485), nor whether he had been denied toilet facilities (1486). He did not ask Cooper whether he had been forced to stay awake (1486). He never even asked to speak to Cooper's father (1488). Thus, the statement by petitioner Cooper in his confession that it was voluntary (2886) becomes meaningless. Reardon's testimony that he noticed no wounds on Cooper's body (1449-1454), has no evidentiary value, for the wounds of Cooper were beneath his clothing, and therefore not visible to this witness, who at all times displayed utter indifference to ferret out facts to challenge the veracity of the voluntariness of Cooper's confession, despite the fact that Cooper had been, to the knowledge of this witness, under arrest and not arraigned for thirty-six hours when the troopers began to take his written confession.

Sgt. Sayers, a "questioner" of Cooper, admitted that Mr. Fanelli had never informed him and had never questioned him about our accusations of Saturday, June 10th; nor had Mr. Fanelli ever called to his attention Dr. Vosburgh's report (1362-1363).

Summary of Argument

Petitioner Cooper seeks a reversal of his judgment of conviction for Murder in the first degree in the County Court of Westchester County, New York, on the ground

that his rights under the due process clause of the Fourteenth Amendment to the Federal Constitution were violated.

Cooper was arrested in New York City on Monday, June 5, 1950, and taken to police barracks in Westchester County, where he was held incommunicado for eighty-five hours, before he was arraigned in a court of law at 10:00 P. M. on June 8, 1950.

During his first thirty-six hours of incarceration, he was beaten and subjected to questioning by State Troopers in relays, for long hours, without proper sleep or food, was kept handcuffed at all times, under heavy guard, without the aid of friends or counsel.

The State Troopers, at the same time, also arrested petitioner's sixty-five year old father, kept him handcuffed, admittedly without legal basis,—for he was not charged with crime,—and used him as a hostage, in a manacled state, to help induce petitioner, badly beaten up, physically and mentally, to confess to participation in the murder.

When arraigned late at night, eighty-five hours after his arrest, he was not represented by counsel, but appeared, in court handcuffed and surrounded only by law-enforcement authorities.

Less than ten hours after the state police surrendered him and his two co-petitioners to the jail warden, the three of them were examined by the jail physician, who noted marks of violence on Cooper and Stein, who had confessed. On Wissner, who had not confessed, he noted marks of violence which included a fracture of a rib.

The State Troopers and the prosecutor furnished no adequate explanation for the marks of violence found on the petitioners within a few hours after they went from State Police custody into the custody of the jail warden.

The undisputed proof showed that the confession was

clearly coerced out of the lips of the petitioner by the violence of State Troopers, was inadmissible against petitioner as a matter of law under the due process clause, and entitles this petitioner to a reversal of his judgment of conviction because based, in whole or in part, upon tainted evidence.

Argument

The admission in evidence of petitioner Cooper's confession was a violation of the rights of petitioner under the due process clause of the Fourteenth Amendment to the Constitution of the United States.

The undisputed facts, as detailed under the preceding Statement of the Case (Brief, 5-33) irresistably lead to the one unavoidable conclusion that the confessions here under attack are the product of coercion, worthless as a *matter of law*, and, as such, were illegally submitted for the jury's considerations.

Unquestionably the undisputed facts herein established that the petitioner was seized and arrested without warrant. He was secreted in a police bedroom in a New York City Station house. He was not there booked as required by law. He was spirited away from his home surroundings, from his family, and from his friends. He was held incommunicado for four days in an isolated, rural police Barracks. He was questioned by police groups in relays during a night, a day, and another night, without friends or counsel present. He was kept fully clothed, in handcuffs, during all the time of detention. He was subjected to the mental torture of seeing his elderly father manacled. He was denied arraignment before a Court for eighty-five hours, admittedly in violation of law. Then, when the State Troopers finally surrendered him to the County jail authorities, he bore on his body, as did the two co-petitioners,

the mute evidence of the physical brutality absorbed while in police custody.

We now respectfully invite this Court's attention to the undisputed evidence of the simultaneously acquired injuries which were recorded as being evident on the bodies of the three petitioners when they were examined at the jail by Dr. Vosburgh. These injuries were suffered by the petitioners while in the custody of the police. We have fully discussed in our statement petitioner's complaints of police brutality as made to the Warden, to the District Attorney, to the Judge of the County Court, and to judges of the New York Supreme Court. We have pointed out that the state troopers denied having ever been questioned *by anyone* concerning Dr. Vosburgh's reports which listed some of the injuries found on the petitioners. The State Troopers all denied knowledge of the existence of such reports. They all denied knowledge or participation in the brutality exerted against petitioners. They all denied knowledge of the petitioner's repeated complaints to the various officials and Courts. They even denied knowledge of newspaper accounts which reported the petitioners' claims of brutality at the hands of the troopers at the Barracks. Even Dr. Vosburgh denied that he knew, or was told by anyone, that the bruises and injuries he noted were asserted to be the result of police brutality. He denied that he had reported to the District Attorney these injuries which he noted on the three bodies. He testified that it was only immediately prior to the commencement of the trial that he was questioned by members of the District Attorney's staff concerning those reports.

John Reardon, the parole officer, alone, of all the witnesses, admitted the existence of State Police conversations at the barracks, in mid-June, concerning the newspaper reports of the petitioner's claims of brutality. It is against

this back-drop of apparent collusive evasion, and officially professed indifference and ignorance, that this Court must evaluate the Respondent's attempts to explain away what, for him, is unexplainable. In the face of this record, the Respondent cannot receive judicial absolvement of the police brutality documented herein.

At the trial, in the Court of Appeals, and now before this Court, the Respondent urged:

> (1) that Cooper's injuries were the result of a "violent episode" occasioned by Sayers at the time of Cooper's arrest (Resp. Brief in Opp. to Certiorari, P. 30; Rec. 1311);
>
> (2) that Stein's injuries were as a result of "the grip of a strong man" at the time of his arrest (Resp. Brief in Opp. to Certiorari, P. 29; Rec. 1740);
>
> (3) "that Wissner, when taken into custody, had injuries; he was under a doctor's care" (Resp. Brief in Opp. to Cert., P. 29; Rec. 2026);
>
> (4) that the injuries of all three "could have been caused in a number of ways, including self-infliction" (Resp. Brief in Opp. to Cert., P. 30).

The Respondent's "explanations" of the origins of the petitioners' injuries have not the least factual existence.

As to petitioner Cooper, Sgt. Sayers testified (1310-1311):

> "I walked up to Cooper, told him we were police officers, ordered him to take his hand out of his right-hand coat pocket, and when he failed to comply I put my hand on his coat pocket; there was an object in there but it was not what I was looking for, and with that, I took him and grabbed him by both arms, and as he started to wheel around, I threw him against the building; I held him there until Sgt. Barber frisked him."

What was that "object" in Cooper's right-hand pocket, for which Sayers admittedly was not looking? None other

than a black note-book (1332). Sayers therefore knew, from having placed his hand into Cooper's pocket, that only a note-book was there and not a weapon. He therefore had no reason to push or throw Cooper against a wall.

The Respondent's Brief in Opp. to Cert., Page 15, purports to give an account of the above occurrence "according to Sgt. Sayers —", and proceeds:

> "After identifying himself and his companions as police officers, Sgt. Sayers ordered Cooper to take his hand out of his pocket. Sgt. Sayers felt an object in Cooper's pocket. Cooper refused. Sgt. Sayers then grabbed Cooper by both arms, and as Cooper started to wheel around, Sayers threw Cooper against the building, which had a cement wall, and then took Cooper into custody." (1310).

And at Page 30 of the same Brief, the Respondent further states that:

> "Sgt. Sayers said he had thrown Cooper against a wall hard because he believed his hand held a weapon in his pocket."

Not only must Respondent be criticized for making this statement which is not borne out by the Record, but Respondent must be further criticized for giving this Court a misleading summary of Sayer's testimony by omitting from that summary the important fact that Cooper had only a harmless note-book in his pocket, which fact Sayers easily ascertained *before* he allegedly pushed Cooper against the wall *once* (1332). The summary is cleverly worded to give this Court the false impression that Sayers thought that Cooper had a weapon in his pocket and therefore the need for "violence."

Petitioner urges that this alleged "violent" episode was created by Sayers in an attempt to explain away the injuries seen on Cooper four days later by Dr. Vosburgh

and others. We do not rest our argument alone on an analysis which must appeal to our reason, but we re-inforce that argument by Jeppeson's testimony—a witness for the People for whose character and integrity the Respondent vouches (Brief in Opp. to Cert., p. 14)—who, as we shall new show, gave Sayers the lie.

The actual testimony of this witness, concerning the alleged incident, as developed by District Attorney Fanelli himself, follows (810):

> Q: "When the police picked you up with Calman Cooper, did you see what the police did with Calman Cooper on 120th Street on the 5th of June last?"
>
> A. "*Told* him to get up against the wall, and he had his hands up and they searched him."
>
> Q: "Did they *push* him up against the wall?"
>
> A: "*I wouldn't say that.*"
>
> Q: "Did you see it?"
>
> A: "No, *I wouldn't say they pushed* him; they *asked* him (to go) against the wall and he put his hands up." (Emphasis added.)

Nowhere in the Respondent's Brief in opposition to Certiorari is there a single word by which the District Attorney seeks to explain away Jeppeson's testimony which obviously proves the falsity of Sayer's explanation.

That Sgt. Sayers' explanation was a recent, futile, fabrication, is shown, not only by his own words and the testimony of Jeppeson, but by the conduct of the prosecutors as well. The charge of police brutality, we have shown, was made on June 19th, and yet it was not until "September" or "October" or "November" that Sayers said he gave Mr. Fanelli his "explanation" (1334). District Attorney Fanelli conceded at the trial that *he himself never took any statement from Sayers in which Sayers gave his Courtroom explanation of Cooper's injuries* (1333).

That the explanation offered by Sgt. Sayers was a recent

fabrication, born of necessity, is further proved by Dr. Vosburgh's testimony. The jail physician testified that the District Attorney himself had never questioned him about the report that he had filed (1251). *Not until October or November*—i.e., about the time the trial began or was scheduled to begin—did the two assistant District Attorneys who participated in the trial (112), discuss his report with him (1258). However, it is significant that the two assistant prosecutors *did not urge, at that interview, that Cooper had been knocked against a stone wall by anyone, or that someone had grabbed Cooper forcibly by the biceps* (1258).

At page 15 of Respondent's Brief in Opp. to Cert. appears the following further misleading paragraph:

> "The extent of any injuries that Cooper may have sustained during this violent episode at the time of his arrest is *unknown* (Emphasis added).

Unknown?—Jeppeson's testimony shows there could be *none* as a result of the arrest incident. Dr. Vosburgh's testimony also shows that Cooper's injuries cannot be accounted for by Sayers' imaginary "violent episode." On cross-examination by the District Attorney, Dr. Vosburgh testified that only "*some* of the injuries" could be accounted for by the hypothetical assumption that Cooper was allegedly pushed or thrown against a stone wall by a police officer (1246-1248).

Sayers himself testified that he had pushed Cooper *only once*. Dr. Vosburgh swore that the injuries he found on Cooper could have been caused *only "by being thrown against a stone wall numerous times."* The record shows the following:

> Q: "How can any person strike a stone wall and get bruises on *both buttocks*, the *left posterior lateral chest area and the abdomen and the right bicep area*—

point out to the jury that by being thrown against a stone wall it can produce all those bruises?"

A: "By being thrown against a stone wall *numerous times.*" (1253), (Emphasis added)

Thus, Dr. Vosburgh, the jail physician, and Jeppeson, Respondent's own "honest business man" (Resp's Brief in Opp. to Cert. p. 14), utterly revealed the falsity of Sayers testimony concerning the origin of Cooper's injuries and bruises.

Stein's Brief discusses fully the facts which prove that his injuries were the result of State Police brutality. Your Petitioner is nevertheless constrained to make the barest reference to the simple facts which should clearly negate Respondent's "explanation" that Stein's injuries were the result of a "strong grip by a strong man."

It was testified by Det. Mulligan that Stein was arrested at 2:00 A. M., June 6th, 1950, at the home of his brother with whom he lived in New York City (1958-1960). A Trooper Crowley further testified that, at the time, while Stein was in his underwear washing up, he noticed nothing abnormal about Stein's arms (1686-7). Stein was handcuffed the moment he left the apartment in custody of the police (1960); and he was handcuffed when he arrived at the Hawthorne Barracks (2082), where he stayed until he, too, was arraigned and jailed, sixty-eight hours after his arrest. Stein was also held under conditions similar to Cooper. He had no bruises on his body when he was arrested in his home; he had them, however, when the State Police surrendered him to the Warden of the jail. It requires no further argument to demonstrate the obvious fact: Stein obtained those bruises at the hands of the State Police while he was in their custody during the period in which his confession was beaten from him.

This Court, in striving to get the true focus of the entire

picture of this case, must of necessity consider the trial testimony as it relates to the co-petitioner Wissner's extensive injuries, which were recorded by the jail doctor. The body of Wissner, the non-confessing petitioner, exhibited evidence of more serious injuries than those of his two confessing co-petitioners. Wissner was not defained at the Barracks for as great a length of time, as were the other two petitioners, before he was arraigned together with them. His "questioning" ordeal evidently was more compresed because he was arraigned thirty-seven hours after his arrest. The injuries found on him showed that the "persuasion" used was also of a more concentrated nature.

In the light of all the foregoing, it would need to stretch credulity to the breaking point to ask any one to believe the shoddy explanation of the Respondent that the injuries shown on the bodies of the three petitioners, when examined by the jail doctor, were separately incurred by them elsewhere other than while in police custody. However, as we have previously noted, the District Attorney in his summation to the jury evidently abandoned the "strong gripstone wall" explanation of Sayers as being too palpably false and relied on the "self-inflicted" theory, for the support of which there was a total lack of any evidence whatsoever.

If, as the prosecution so energetically stresses, two petitioners confessed voluntarily, why then the sudden need or desire to self-inflict any injury on their bodies?

Wissner, however, had made no confession. Why inflict injuries on himself? None but the gullible could naively believe that Wissner, who had not confessed, would, or even could, during those ten hours following his arraignment, fracture one of his ribs and otherwise seriously injure himself to the extent found by Dr. Vosburgh.

If the injuries were self-inflicted, they could only have

been self-inflicted during the preceding period of ten hours of confinement in the County jail, before their examination by Dr. Vosburgh—hours from midnight to ten in the morning, each petitioner distantly separated from the other. The baseless contention of the prosecutor that the injuries were self-inflicted was exploded by Dr. Vosburgh who testified, in answer to the District Attorney's questions, that Cooper's injuries were "possibly not a week" (old), but "possibly six days" (old)—(1246)—injuries, according to Dr. Vosburgh, producable by blows with a human fist, rubber hose or a club (1240).

In addition to the infliction of physical injuries on petitioner Cooper, there is serious doubt whether he was permitted to sleep, whether he was fed, and whether he was afforded facilities to take care of other natural functions.

It is unquestioned that at the Barracks he was continuously kept handcuffed within the confines of a small office that was encumbered by desks, chairs, and filing cabinets, regularly used by four employees and othrs. It is in this room that he was kept under heavy guard for twenty-four hours a day. It is in this room that he was seen sitting on a chair. It is in this room that relays of troopers questioned him on Monday night and throughout Tuesday, until, late that night, he confessed.

To destroy the inference that he was not questioned and beaten continuously from Monday night until he confessed, the prosecution, through some unrealiable police testimony, injected into the case the suppositious fact that a mattress was placed on the floor of the office where petitioner was kept, to permit him to sleep, fully dressed and handcuffed. The Barrack mattresses are seven feet long, four feet wide, and eight inches thick (1358). The People would have one believe that that large mattress was placed on the floor in a room fifteen by twenty feet (1202, 1394), when that room

was already crowded with at least two desks, five chairs and fourteen filing cabinets (1344, 1635, 1636).

Anticipating judicial review in higher courts, some of the People's witnesses, all officials, created the fiction that a mattress was furnished petitioner. But the fabrication was too late and too clumsy to exclude the truth from prevailing in this Court.

Sgt. Sayers, on this point, early in the trial, testified as follows under defense cross-examination (1350):

> "Q. Now, was there a mattress in the room at eight o'clock at night? A. No, sir.
> Q. Monday night. A. No, sir.
> Q. There was no mattress there then? A. No, sir.
> * * * * * * *
> Q. *Tell me; did you see a mattress in that room at any time?* A. *No, sir.*
> * * * * * * *
> Q. Did you see Cooper on any mattress at all at any time that night in any room in the Barracks?
> A. No, sir." (Emphasis supplied).

Sayers was in a position to know, for he was one of the senior officers in charge of the case (1338) and had done most of the questioning on Monday and on Tuesday.

It is reasonable to infer, therefore, that, between the questioning and the beatings, Cooper had no sleep from his arrival in the Barracks until he confessed.

There is further doubt whether Cooper was fed, in spite of testimony to the contrary, in the light of experiences of others who were confined in those Barracks at the same period. Jeppeson, a witness friendly to the State Troopers and to the prosecution did not receive the "hot food" and "trays" fictionally supplied to the petitioner. Jeppeson was neglected and allowed to go hungry. He had to go into the kitchen himself to help himself secure food (800).

In fact, he had to arrange *himself* to sleep, as he could not sleep on a couch (801).

Dorfman, who had surrendered and had himself photographed as a precaution in case he was beaten, denied he received any meals. He was fed only coffee and a dry baloney sandwich—after they "got all through" "pushing" him from 1.00 o'clock to ten o'clock on the day of his arrest (656, 657).

Assuming, arguendo, without conceding, that there were questions of fact for the jury to consider in connection with the voluntariness of petitioner Cooper's confession, even then the Trial Court was in error by: (1) Striking from the Record (Rec. 2516) Dr. Cusack's psychiatric testimony (2498-2508); (2) not allowing the jury to consider the Dannemora State Hospital records (Exh. S.S.S.; T.T.T.; U.U.U., for ident.—Rec. 2487 to 2498); and (3) Not permitting the jury to consider the expert medical testimony relating to Cooper's mental health (Dr. Cusack's testimony, Rec. 2498 to 2508). The jury had the right and duty to know that Cooper had been declared insane on three separate occasions and had as a result been incarcerated for more than six years in a State insane asylum under recognized psychosis. Such knowledge, if it had been given to the jury, conceivably might have induced them to find that, because of his mental history, Cooper could not—under the coercive circumstances under which the confession was obtained—have made any voluntary confession.

We respectfuly contend, therefore, that this Court has the power to do and should do what the trial Court failed to do—reject the confession as not freely made, because there was in law no issue of fact to be submitted to the jury.

Lisenba v. *California*, 314 U. S. 219, 240;
Ward v. *Texas*, 316 U. S. 547, 550;
Ashcraft v. *Tennessee*, 322 U. S. 143, 145;
Haley v. *Ohio*, 332 U. S. 596, 599, 600.

Federal Consitutional guarantees protect the petitioner from the use against him of a confession which was palpably extorted and obtained incontestably during a period of time after he should have been arraigned.

State courts do frequently reverse when an extorted confession is admitted in evidence.

People v. *Barbato*, 254 N. Y. 170, 176;
People v. *Mummiani*, 258 N. Y. 394, 396.

A Constitutional guarantee, however, is not sustained but impaired where State courts give it only lip service and enforce it only by a repetition of generalities, as a trial judge did here, but sanction its violation by disregarding its protecting nature in actual practice.

It is this Court alone that can sustain the integrity of the due process clause where State Courts shut their eyes to a clear violation and sanction a practice of torture condemned in every civilized state.

A criminal, however shocking his crime, is not to answer for it with forfeiture of life or liberty till tried and convicted in conformity with law.

People v. *Moran*, 246 N. Y. 100, 106;
People v. *Levan*, 295 N. Y. 31, 32.

Having allowed the confession of Stein and of your petitioner to be marked in evidence and given to the jury, the trial court instructed the jurors that, unless they found that the confessions were voluntary, they should disregard their contents in reaching a verdict (2767); but the trial court improperly refused to instruct the jurors to return a verdict of acquittal if they found that your petitioner's confession was not voluntary (2778, 2781).

The trial court refused, although specifically requested so to do, to submit to the jury, as a specific question, to be answered as part of the verdict, whether your petitioner's confession was brought about by fear induced by threats.

The same request on behalf of Stein was likewise denied (2783).

A judgment of conviction will be set aside by this Court even though the evidence, apart from the confession, might have been sufficient to sustain the jury's verdict.

Lyons v. *Oklahoma*, 322 U. S. 596, 597;
Malinski v. *New York*, 324 U. S. 401, 404;
Gallegos v. *Nebraska*, 342 U. S. 55.

For all the foregoing reasons, it is respectfully submitted that the confession of the petitioner Cooper, being involuntary and obtained in violation of Section 395 of the Code of Criminal Procedure and of the due process clause of the State and Federal Constitutions, the trial court erred in submitting, over objection and exception, the voluntariness of the confession as a question of fact for determination by the jury.

Conclusion

No matter how clear the guilt of a defendant in any particular case may appear to arresting officers, prosecutors or judges, yet, this Court, speaking for a civilized society, must not countenance a course of conduct which is repugnant to all but those blinded by an interest in a particular prosecution.

Petitioner's rights under the Constitution having been unlawfully invaded, it is respectfully submitted that the judgment should be reversed.

Respectfully submitted,

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APPENDIX

A

UNITED STATES CONSTITUTION, AMENDMENT XIV, SECTION 1

"nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

B

TITLE 28, SEC. 1257, U. S. CODE

"Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

"(3) By writ of certiorari where any right, privilege or immunity is specially set up or claimed under the Constitution of the United States."

C

FEDERAL RULES OF CRIMINAL PROCEDURE:

RULE 5. PROCEEDINGS BEFORE THE COMMISSIONER.

"(a) Appearance before the Commissioner. An officer making an arrest under a warrant issued upon a complaint or any person making an arrest without a warrant shall take the arrested person *without unnecessary delay* before the nearest available commissioner or before any other nearby officer empowered to commit persons charged with offenses against the laws of the United States."

D

CODE OF CRIMINAL PROCEDURE OF NEW YORK, SEC. 165:

"The defendant must in all cases be taken before the magistrate without unnecessary delay, and he may give bail at any hour of the day or night."

E

PENAL LAW OF NEW YORK, SEC. 1844:

"A public officer or other person having arrested any person upon a criminal charge, who wilfully and wrongfully delays to take such person before a magistrate having jurisdiction to take his examination, is guilty of a misdemeanor."

F

PENAL LAW OF NEW YORK, SEC. 1044:

"The killing of a human being, unless it is excusable or justifiable, is murder in the first degree, when committed:

* * *

"2. * * * without a design to effect death, by a person engaged in the commission of, or in an attempt to commit a felony, either upon or affecting the person killed or otherwise:"

G

SECTION 395 OF THE CODE OF CRIMINAL PROCEDURE OF THE STATE OF NEW YORK

Confession of defendant, when evidence, and its effect.

"Confession of a defendant, whether in the course of judicial proceedings or to a private person, can be given in evidence against him, unless made under the influence of fear produced by threats,—but is not sufficient to warrant his conviction without additional proof that the crime charged has been committed."